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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR MENDIETA,

Defendant and Appellant.

D073640

(Super. Ct. No. SCN151192)

APPEAL from a judgment of the Superior Court of San Diego County, Blaine K. Bowman, Judge. Affirmed.

Arthur Martin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Kristine A. Gutierrez and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Hector Mendieta guilty of one count of first degree murder (Pen. Code, § 187, subd. (a)), with a further finding that he personally used a dangerous or

deadly weapon (a knife) (*id.*, § 12022, subd. (b)(1)). The trial court sentenced Mendieta to an indeterminate prison term of 26 years to life.

Mendieta contends that the trial court violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution and committed prejudicial evidentiary error by precluding defense counsel from questioning a central prosecution witness about the witness's immigration status to show the witness had a motive to testify in a manner favorable to law enforcement. We conclude that Mendieta's argument lacks merit, and we accordingly affirm the judgment.

I.

FACTUAL AND PROCEDURAL BACKGROUND

After midnight on September 10, 2002, in the parking lot of a bar in Escondido (the bar) Mendieta stabbed Bartolo Velador six times, including twice in the chest and twice in the back. Shortly thereafter, Velador bled to death. Mendieta fled to Mexico and was extradited to the United States in 2016 to face trial in this case for Velador's murder.

At trial, several witnesses who were at the bar the night Velador was killed testified to what they remembered from 2002.

Renee S.¹ was a friend of both Velador and Mendieta, and had a prior intimate relationship with Mendieta. She and Velador went to the bar twice on the evening of the stabbing. The first time was sometime after 8:30 p.m., and they stayed only a few

¹ To protect the privacy of the witnesses, we refer to them by their first name and last initial, and we intend no disrespect by doing so.

minutes. Mendieta and his friends were playing pool. As Velador walked by, Mendieta said something such as "Get the fuck out of here" and "What are you doing here?"

Mendieta was agitated and angry, and Velador seemed confused as to why. Velador and Renee left the bar and returned sometime after midnight for the second visit. During that visit, Renee was in the front parking lot of the bar talking to a woman named Maria L.

After a few minutes, Velador exited the front door of the bar, with Mendieta following behind him.² Mendieta angrily and loudly confronted Velador with the same sort of hostile statements he made earlier, such as "What the fuck are you doing here?" Velador stated that he didn't want any problems and put his hands up in a nonaggressive manner. Mendieta then twice hit Velador in the face. Velador reached into his pocket, took out something and threw it to the ground. Renee could not see exactly what it was, but she described it as "small . . . like nuts and bolts or something."³ Renee believed that Velador threw the item to distract Mendieta, so he could run away. Mendieta then pulled out a knife and chased Velador through the parking lot. Renee saw Mendieta stab Velador's torso more than once, and she then looked away. Renee heard Mendieta continue to grunt and groan as he stabbed Velador. In an interview with police on the day of the stabbing, which was played for the jury, Renee told the police that based on

² In an interview with police on the day of the stabbing, Renee said that Mendieta was already outside the bar sitting on the curb when Velador came outside. With a few minor discrepancies, Renee's testimony at trial was consistent with what she told police immediately after the fact.

³ Subsequently, a silver mechanic's socket was found on the ground in the parking lot of the bar.

the groaning, it was as if Mendieta was "getting some kind of perverse pleasure or somethin[g]" from stabbing Velador. Velador fell to the ground and never got up. Mendieta's friend Miguel V. came out of the bar, and Mendieta and Miguel both started to kick Velador all over his body. Miguel then went into the bar to gather his other companions, and they drove away in a car along with Mendieta and Maria.

Maria testified that she was friends with Mendieta in 2002, and she often spent time at the bar because she was homeless. Maria was talking to Renee in the parking lot of the bar on the night of stabbing when she witnessed Mendieta ask Velador where his money was. Velador then threw "a lug nut or something" about an inch and a half wide at Mendieta, which struck Mendieta in the chest or somewhere else on his body. Mendieta ran toward Velador and started stabbing him. After Velador fell down, Mendieta and Miguel kicked him in the head more than once. Velador did not get back up. Maria left in a car with Mendieta and his friends to drive to the house of Mendieta's aunt. On the way, Mendieta threw the knife out of the car window. At the aunt's house, Maria heard Mendieta say the equivalent of "I fucked him up" in Spanish. Mendieta had blood all over him, including his hands, shirt and shoes.

Orlando B. is Mendieta's cousin. He had a car in 2002, unlike Mendieta, so he often drove Mendieta around, and he was in the bar with Mendieta on the night of the stabbing. Orlando testified that before the day of the stabbing, he was aware that Mendieta did not like Velador. Specifically, a few days earlier, Mendieta had made comments in Velador's presence in the bar, such as "Why is he here" and about Velador being from the other side of town. On the night of the stabbing, Mendieta and his friends

were directing hostile looks toward Velador. Orlando witnessed a confrontation between Velador and one of Mendieta's acquaintances, "Chunky," around 9:30 p.m., during which Chunky said something such as "What do you think you are doing here?" to Velador.⁴ Velador left the bar, and Mendieta said to his companions, "What was he doing here?"⁵

Later that night, Orlando saw intimidating looks between Mendieta and Velador as the two men walked out the door of the bar. When Orlando went to the bar door and briefly looked outside, he saw Mendieta, Miguel and another friend of Mendieta (Flaco) arguing with Velador, but he could not hear what they were saying. Orlando later told police it seemed the men were arguing about something "stupid" such as how they were looking at each other. A short time later, Miguel came into the bar and told Orlando they had to leave because someone got stabbed. Orlando did not find out until they were on the way to the aunt's house that Mendieta had stabbed Velador.

In the car, Mendieta told Orlando that he got into an argument with Velador in front of the bar, the men engaged in pushing and hitting, and then Mendieta took out his knife and stabbed Velador. Mendieta said he "fucked up the guy," and Mendieta did not sound like he had any remorse for stabbing Velador. At the aunt's house, Orlando saw Mendieta wiping blood from his pants, hands and stomach. Orlando left the aunt's house

⁴ According to Orlando, Chunky associated with the Diablos gang, and the bar is in Diablos territory. Mendieta admitted to knowing that Velador was from the other side of town.

⁵ The bartender testified about a confrontation between Velador and a man who was not Mendieta at around 10:30 p.m. She broke up the confrontation by separating the men, after which Velador left the bar. According to Orlando, the bartender separated Velador and Chunky. Mendieta testified that he did not know anyone named Chunky.

and was arrested the next day. Orlando eventually told the police what happened, and he later pled guilty to being an accessory after the fact.

Mendieta testified in his own defense. He admitted to stabbing Velador, but claimed he did it because he was scared of Velador. According to Mendieta, he had never before spoken with Velador, including any hostile comments earlier on the day of the stabbing. Mendieta testified that immediately before the stabbing, he was smoking a cigarette outside the bar when he made eye contact with Velador, who said to him the equivalent of "What the fuck are you looking at?" in Spanish. Mendieta responded with something such as "Fuck off" or "Get the hell out of here." Velador punched Mendieta, and Mendieta punched back. Velador put his hand in his pocket and took out something shiny. In response, Mendieta took out his knife. When Velador threw something at Mendieta, which hit him in the chest, Mendieta swung at Velador with his knife and stabbed him multiple times. Mendieta thought that Velador had taken a knife out of his pocket before throwing something because Mendieta saw a flash of metal. Not until the fight was over did Mendieta realize that he was not being stabbed by Velador as they fought. According to Mendieta, Miguel kicked Velador while Velador was fighting with Mendieta on the ground, but Mendieta himself never kicked Velador. After the stabbing, Mendieta left in a car with his friends, threw away the knife while in route to his aunt's house, and washed his clothes to remove the blood that was on his shirt, pants and shoes. Mendieta denied ever telling his friends "I fucked him up" regarding Velador and denied that he ever had any animosity toward Velador or interactions with him before the

stabbing. Mendieta fled to Mexico shortly after the stabbing and had no intention of ever returning to the United States.

The physical evidence presented at trial showed that after the stabbing, the bar's parking lot was covered in numerous puddles of blood, which stretched a length of 100 feet from the door of the bar to the location in the parking lot where Velador was lying on the ground. Velador had six deep stab wounds in his body: two in his chest, which damaged his aorta; two in his back, which penetrated his lungs; one in his shoulder; and one in his arm. Velador also had a cut over his left collarbone, and multiple abrasions from blunt force trauma on his face, elbow, legs, thighs and knees.

The jury convicted Mendieta of first degree murder (Pen. Code, § 187, subd. (a)), and made a true finding that he personally used a dangerous or deadly weapon (a knife) (*id.*, § 12022, subd. (b)(1)). Mendieta was sentenced to an indeterminate prison term of 26 years to life.

II.

DISCUSSION

As the only issue raised on appeal, Mendieta challenges the trial court's decision to sustain the People's objection to defense counsel's attempt to impeach Orlando's credibility by asking Orlando whether he had any "issue" with his "immigration status."

A. *Background*

During Orlando's direct examination, the prosecutor elicited testimony from Orlando that he had left California without completing his probation for the conviction he incurred for being an accessory after the fact. Orlando testified that when he was in

California for the preliminary hearing in this case in April 2017, he admitted the probation violation, but he had not yet been sentenced. Orlando stated that he was not testifying in a certain way based on a belief that such testimony could benefit him in the sentencing for his parole violation.

During cross-examination of Orlando, defense counsel confirmed with Orlando that he was going to "get sentenced for a probation violation at some point when this murder case [where] you're testifying right now is concluded." Defense counsel then asked, "And what about your immigration status? Is that an issue that you have—" The People interposed an objection on the basis of relevancy. The trial court held a sidebar discussion about the objection, during which defense counsel argued that due to Orlando's immigration status, Orlando "may subconsciously want to . . . please the prosecutor more," and that "a recommendation from the prosecutor, in his mind, might make his being deported less likely." However, defense counsel admitted that he could not make an offer of proof as to what Orlando might say about his immigration status because Orlando's immigration attorney "put the nix" on his proposal to interview Orlando.⁶ Nevertheless, defense counsel argued that deportation is "a concern that [Orlando] has to have after admitting a felony probation violation." The People informed the trial court, "We've offered him nothing." During an in limine hearing, when another aspect of Orlando's testimony was at issue, the prosecutor had already informed the trial court that "we are doing nothing with him with regard to immigration."

⁶ Defense counsel referred to Orlando's "immigration attorney" being in the courtroom during Orlando's testimony.

After conducting an analysis under Evidence Code section 352, the trial court sustained the People's objection. The trial court explained that although defense counsel was unable to provide any offer about what Orlando would say regarding his immigration status, the issue "might have some marginal relevance." However, the trial court did not want "to waste an inordinate amount of time talking about [Orlando's] immigration status and confusing the issue," and thus ruled that it would disallow questioning on that issue.

B. *Mendieta's Confrontation Clause and Evidentiary Error Arguments*

Mendieta contends that the trial court prejudicially erred in two respects by sustaining the prosecutor's objection to the question about Orlando's immigration status. First, he contends that his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution were violated because he was prevented from impeaching Orlando's credibility by showing Orlando's motive to testify in a manner that would favor the prosecution. Second, he contends that the trial court abused its discretion afforded under the rules of evidence by sustaining the People's objection under Evidence Code section 352.

As an initial matter, we address the issue of forfeiture. Mendieta did not raise any Confrontation Clause argument in the trial court when arguing that he be permitted to question Orlando about his immigration status. The People contend that Mendieta has accordingly forfeited the Confrontation Clause argument. (See *People v. Thornton* (2007) 41 Cal.4th 391, 427 ["Defendant contends that the trial court erred in sustaining prosecution objections to evidence he wished to develop" and "that the result deprived him of his right to confront the witnesses against him under the confrontation

clause Because he did not raise this claim before the trial court, he has forfeited it").⁷ In his reply brief, Mendieta argues that if the Confrontation Clause challenge is forfeited, we should nevertheless exercise our discretion to consider the issue. To forestall any ineffective assistance of counsel claim, we will exercise our discretion and reach the Confrontation Clause issue regardless of whether it has been forfeited.

1. *Confrontation Clause*

"The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' . . . Of particular relevance here, ' . . . the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.' . . . It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other

⁷ We note, however, that "[c]onstitutional claims raised for the first time on appeal are not subject to forfeiture . . . when 'the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to the court, had the additional legal consequence of violating the Constitution.' " (*People v. Tully* (2012) 54 Cal.4th 952, 979-980.) Because a Confrontation Clause analysis involves similar facts and legal standards as the analysis as to whether a defendant should be permitted under the rules of evidence to impeach a witness to develop bias, it is arguable that the Confrontation Clause argument is not forfeited here and may be considered along with the challenge to the trial court's ruling sustaining the objection pursuant to Evidence Code section 352.

things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678-679 (*Van Arsdall*), citations omitted.)

"In particular, notwithstanding the confrontation clause, a trial court may restrict cross-examination of an adverse witness on the grounds stated in Evidence Code section 352. . . . A trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received *a significantly different impression* of the witness's credibility had the excluded cross-examination been permitted." (*People v. Quartermain* (1997) 16 Cal.4th 600, 623-624 (*Quartermain*), citation omitted, italics added.) When the evidence in question "would impeach [a] witness[] on collateral matters and [is] only slightly probative of . . . veracity, application of Evidence Code section 352 to exclude the evidence [does] not infringe defendant's constitutional right to confront the witnesses against him." (*People v. Jennings* (1991) 53 Cal.3d 334, 372.)

For two reasons, Mendieta has not established that the "jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted." (*Quartermain, supra*, 16 Cal.4th at p. 624.)

First, defense counsel admitted that he had *no* offer of proof regarding Orlando's immigration status. " 'It is the burden of the proponent of evidence to establish its relevance through an offer of proof or otherwise,' and a specific offer of proof is necessary in order to preserve an evidentiary ruling for appeal. [Citation] 'An offer of proof should give the trial court an opportunity to change or clarify its ruling and in the

event of appeal would provide the reviewing court with the means of determining error and assessing prejudice. [Citation.] To accomplish these purposes an offer of proof must be specific. It must set forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued.' " (*People v. Brady* (2005) 129 Cal.App.4th 1314, 1332; see also *People v. Morrison* (2004) 34 Cal.4th 698, 711 [" 'As a condition precedent to challenging the exclusion of proffered testimony, Evidence Code section 354, subdivision (a), requires the proponent make known to the court the 'substance, purpose, and relevance of the excluded evidence . . . ' "].) Here, because defense counsel was unable to provide an offer of proof regarding the evidence he wished to have admitted, we have no basis on which to conclude that admission of the evidence about Orlando's immigration status would have given the jury a significantly different impression about his credibility.

Second, even if Orlando was concerned about being deported after having admitted the probation violation, the jury would not have received a significantly different impression of Orlando's credibility. Because the jury was already aware of evidence that was *more* probative of Orlando's possible bias in favor of the People, introduction of evidence that Orlando also had a problem with his immigration status would not have been likely to significantly change the jury's impression of whether Orlando had a reason to testify in a manner favorable to the People. Specifically, as we have explained, the jury was aware that Orlando was awaiting sentencing in California on a probation violation. In light of Orlando's pending sentencing, the jury could infer that Orlando might have believed that the People would make a favorable recommendation at

sentencing if he helped them in Mendieta's prosecution by offering certain testimony. However, because immigration is a federal matter, evidence that Orlando could have a problem with his immigration status constitutes much weaker evidence that Orlando had a motive to curry favor with the People. Indeed, the prosecutor repeatedly explained to the trial court during the in limine hearing that the People had no involvement in any immigration issues concerning Orlando. Thus, Mendieta has not established that jury might have significantly changed its impression about Orlando's possible bias toward the People had defense counsel been able to examine Orlando about any possible immigration issues, as the possibility of such bias had already been presented through much stronger evidence about Mendieta's pending sentencing for his probation violation.

2. *State-Law Evidentiary Error*

Mendieta also contends that the trial court erred in applying Evidence Code section 352 to exclude evidence of Orlando's immigration status.

"As a general matter, a defendant is entitled to explore whether a witness has been offered any inducements or expects any benefits for his or her testimony, as such evidence is suggestive of bias." (*People v. Brown* (2003) 31 Cal.4th 518, 544.) Nevertheless, "[a] trial court may restrict defense cross-examination of an adverse witness on the grounds stated in Evidence Code section 352." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 207.) Evidence Code section 352 gives the trial court discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." We do not

disturb that discretion unless it was exercised in " 'an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) " [T]he latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.' " (*People v. Ayala* (2000) 23 Cal.4th 225, 301.)

Here, the trial court explained that evidence regarding Orlando's immigration status "might have some marginal relevance," but it would exclude the evidence to avoid wasting an inordinate amount of time and confusing the issues. The trial court was well within its broad discretion to make such a ruling. As we have explained, the jury already had before it much stronger and more direct evidence of a possible motive for Orlando to try to curry favor with the prosecution, namely he was awaiting sentencing on his probation violation. In light of that evidence, the trial court could reasonably conclude that the admission of additional evidence that was only *marginally* relevant to Orlando's possible bias toward the People was not justified in light of the time it would consume and the risk it posed of introducing extraneous and confusing issues concerning immigration matters to the jury.

3. *Prejudice*

Even were Mendieta to establish error, he would not be able to establish prejudice. The more demanding standard of prejudice, which applies to a Confrontation Clause violation, requires us to examine whether "the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of

factors These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (*Van Arsdall, supra*, 475 U.S. at p. 684.)

Mendieta contends that if he was able to impeach Orlando's credibility by introducing evidence regarding Orlando's immigration status, the prosecution may not have been able to establish that Mendieta acted with premeditation and deliberation in killing Velador. Specifically, Mendieta argues that two items of Orlando's testimony were crucial to establishing premeditation and deliberation: (1) Orlando's testimony that Mendieta exhibited animosity toward Velador before the stabbing, contradicting Mendieta's claim that he had never before interacted with Velador; and (2) Orlando's testimony that Mendieta did not express any remorse in the car after the killing, and instead stated that "he fucked up the guy," referring to Velador.

We reject Mendieta's argument because Orlando's testimony was cumulative of other evidence on the issues identified by Mendieta. On the issue of preexisting animosity between Mendieta and Velador, Renee testified that on her first visit to the bar with Velador on the night of the stabbing, Mendieta made hostile remarks to Velador that indicated that Velador was unwelcome in the bar, such as "Get the fuck out of here" and "What are you doing here?" On the issue of whether Mendieta expressed any remorse immediately after the stabbing, Maria was also in the car with Orlando and Mendieta, and she did not testify to any expression of remorse by Mendieta. Further, consistent with

Orlando's testimony (and contrary to Mendieta's denial of making such a statement), Maria testified that she heard Mendieta say "I fucked him up" about Velador. In light of this testimony by Renee and Maria that corroborated Orlando's testimony, we conclude beyond a reasonable doubt that Mendieta would not have received a more favorable result on the issue of premeditation and deliberation had the jury heard evidence about any immigration issue involving Orlando that might have caused the jury to doubt Orlando's credibility.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.